# No. 11,144

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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PETER L. YOUNG,
*Appellant,*

vs.

TERRITORY OF HAWAII,
*Appellee.*

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## BRIEF FOR APPELLANT.

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This appeal is by defendant in a criminal action from a final judgment of the Supreme Court of the Territory of Hawaii.

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### STATEMENT OF JURISDICTION.

Appellant was indicted by the Grand Jury of the Territory of Hawaii, First Circuit, violation Section 11652, Revised Laws of Hawaii, 1945, i.e. the crime of abortion. He was tried in the Circuit Court, First Circuit, and convicted (R. 27). Following his conviction and within the time allowed by statute (Chapter 186, Revised Laws of Hawaii, 1945), he prosecuted a writ of error to the Supreme Court of the Territory of Hawaii. The Supreme Court had jurisdiction (Sec.

9551, Revised Laws of Hawaii, 1945). The final judgment of the Supreme Court of the Territory of Hawaii affirmed the judgment of the said Circuit Court (R. 53). Appellant duly appealed to this court (R. 55). The jurisdiction of this court to review the final judgment of the Supreme Court of the Territory of Hawaii is sustained by Section 128 of the Judicial Code (28 U.S.C.A., Sec. 225).

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**STATEMENT OF THE CASE.**

Appellant was convicted of violating Section 11652, Revised Laws of Hawaii, 1945. This section, which in the 1935 revised laws was Section 6232, reads as follows:

> "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent, shall, if the woman be then quick with child, be punished by a fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years; and if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years."

The indictment against appellant charged that he "maliciously, wilfully, unlawfully and feloniously, and without lawful justification, did use and employ

an instrument and a certain noxious substance, a more particular description of which are to the Grand Jury unknown, by then and there forcing said instrument and said noxious substance into the body and womb of a certain woman, to-wit, one Rose Dolim, she, the said Rose Dolim, being then and there pregnant and not quick with child, with intent * * * to use the said instrument and noxious substance as aforesaid to produce and procure the miscarriage of the said Rose Dolim * * *"

While the indictment charged that Peter L. Young did the acts complained of in association with Hilda M. Nozawa, a severance was granted and Peter L. Young was tried alone (R. 14).

When the evidence was in, the court instructed the jury and, over the objection of appellant, gave the following instruction:

> "I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proves him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured up doubt, such as you might conjure up to acquit a friend, but *a doubt that you could give a reason for.*"

On writ of error to the Supreme Court, appellant challenged this instruction, the giving of which by the trial court he assigned as error.

**SPECIFICATION OF ASSIGNED ERRORS RELIED ON.**

The particular objection to the instruction quoted above is found in the last sentence of the first paragraph thereof which reads as follows: "And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured up doubt, such as you might conjure up to acquit a friend, but *a doubt that you could give a reason for.*" Appellant has assigned this instruction, given as aforesaid, as error.

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**ARGUMENT.**

The instruction complained of, restricting a reasonable doubt to one which may be "boxed in" so to speak, places the burden on defendant to develop in the evidence not only a reasonable doubt, but a reasonable doubt of a kind a juror can give a reason for; in effect, a demonstrable doubt. It ignores the impalpable element in evidence which may leave a juror, for no assignable reason, unwilling to accord the prosecution's case the accolade of truth; yet he is told in effect under this instruction he must convict anyway. Though he may not be able in good conscience to do so, he must convict because he can furnish no specific, tangible reason to explain his reaction to testimony which has left his mind in doubt on the issue of defendant's guilt.

Both State and Federal Courts have reversed criminal cases where the trial court, departing from the

classic definition of "reasonable doubt" given by Chief Justice Shaw in *Commonwealth v. Webster,* 8 Cush. 293, limited such doubts to a class having a definite expressable reason.

The Circuit Court of the 8th Circuit, twice in a relatively short time, reversed the Supreme Court of the Territory of New Mexico, which had held the trial court did not commit reversible error in giving such an instruction to a jury. In the first case, *Pettine v. Territory of New Mexico,* 201 Fed. 489, the court instructed the jury:

> "* * * that a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case."

Notwithstanding this instruction, the Supreme Court of New Mexico sustained the conviction, but on appeal the Circuit Court reversed this decision. Circuit Judge Sanborn, who delivered the opinion for the court, said:

> "In a criminal case the presumption of innocence accompanies the defendant throughout the trial. The burden is on the government to overcome this presumption, to produce evidence that will satisfy the minds of the jury beyond a reasonable doubt of the guilt of the accused. The burden is upon the prosecution to furnish to the jury by the evidence it produces, sound reasons for the conviction of the defendant, reasons that shall produce and maintain in their minds an abiding conviction of his guilt to a moral certainty. Now to say that a doubt of the guilt of an

accused person which a juror may indulge is not a reasonable doubt unless he can give a reason for it based on the evidence or want of it is to reverse this established rule, and to put upon the accused the burden of furnishing the jury with a reason for his acquittal; for, if the juror must give a reason for his doubt, he must give a sound reason, or this new rule is idle and ineffective. If no juror who has a doubt of the guilt of the accused may lawfully vote for his acquittal unless he can give a sound reason for his doubt based on the evidence or the want of it, the question immediately arises whether this reason must be sound in his own opinion only, or in the opinion of his fellow jurors, or of the judge, and, once adopt this rule and instructions on this subject must inevitably multiply and add dialectics and confusion to the rule and its application. The ability to give sound reasons for their doubts or their beliefs is not given to many men, and every prudent and thoughtful man at once recognizes the fact that in the graver and more important affairs of his own life doubts for which he can formulate no convincing reason often induce him to act or to refuse to act. To require every person accused of crime to present such a state of evidence at his trial that every juror can give a sound reason based on the testimony for his doubt of his guilt before he may vote for his acquittal places too heavy a burden on the accused. It destroys the rule of reasonable doubt and substitutes for a reasonable doubt a demonstrable doubt logically and conclusively sustained by the evidence or the want of it. The court below was in error when it placed this heavy burden upon the de-

fendant, and charged the jury that a reasonable doubt was one for which a reason could be given founded on the evidence or want of it."

In the second case from New Mexico (*Ayer v. Territory,* 201 Fed. 497), the Supreme Court recognized the instruction as wrong but concluded defendant had not been prejudiced thereby. The Circuit Court, taking issue, said: "* * * because this instruction destroys the rule of reasonable doubt, substitutes for a reasonable doubt a demonstrative doubt, logically and conclusively sustained by the evidence or want of it and places too heavy a burden on defendant, it is error."

The Nebraska Supreme Court, in *Cowan v. State,* 22 Neb. 519, reversed a case where the trial court has instructed the jury that a reasonable doubt was one for which the jury could give a reason. The Supreme Court took issue with this definition; said it was calculated to mislead the jury. "The definition of reasonable doubt", said the Nebraska Supreme Court, "given by Chief Justice Shaw in *Commonwealth v. Webster,* 8 Cush. 293, is, that the evidence must be such as to 'establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason of those who are bound to act conscientiously upon it.' This seems to be the correct definition of a reasonable doubt."

A conviction was reversed in *State v. Parks,* 115 A. 305, 96 N. J. Law 360, because an instruction was

given substantially the same as the one given in the case at bar. "Reasonable doubt is not necessarily a result to be worked out by the rules of logic", the New Jersey Supreme Court said, "it may likewise legitimately arise from the impressions, often incapable of analysis, made upon the minds of jurors by the evidence and the witnesses * * * The same or similar criticism applies to a further instruction in this case, that reasonable doubt is a *'doubt arising upon the evidence for which you, as reasonable men, can give a good and sufficient reason'.* Both instructions contained harmful error." Conviction was reversed.

In another New Jersey case (*State v. Rosenberg,* 97 N. J. Law 430, 118 Atl. 207), the court dealt at length with this erroneous definition of reasonable doubt. Said the court:

> "It is further insisted on behalf of Plaintiff in error that the learned judge erred in charging the jury on the question of reasonable doubt. He charged that a reasonable doubt was 'a doubt respecting his (defendant's) guilt arising upon the evidence, or from the lack of evidence, for which you as reasonable men can give a good and sufficient reason.' It is observable that the learned judge makes the existence of a reasonable doubt depend upon the condition that where a juror's mental state, after hearing the evidence, is such that he can give a good and sufficient reason for the doubt he entertains. This view is antagonistic to the settled law of this state. We have adopted the doctrine of reasonable doubt as defined by Chief Justic Shaw in *Commonwealth v. Webster,* 5 Cush. (Mass.) 295, at page 320, 52 Am. Dec.

711; *Donnelly v. State,* 26 N. J. Law 601 at page 615. The test there furnished as to when a reasonable doubt may be properly said to have arisen is stated as follows:

"'Reasonable doubt is not a mere possible doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'

See *State v. Linker,* 94 N. J. Law 412, 111 Atl. 35.

"Keeping this definition in view, as to what in law constitutes a reasonable doubt, it is quite plain that the test to be adopted by the jurors to determine whether such reasonable doubt exists according to the decisions of our highest tribunals, is not whether the jurors can give a good and sufficient reason for their doubt, but the arising of such reasonable doubt is predicated solely upon the state of mind produced upon the jurors, by a comparison and consideration of all the evidence in the case, so that they cannot say that they feel an abiding conviction amounting to a moral certainty of the truth of the charge."

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**CONCLUSION.**

The cases we have cited, it is respectfully submitted, represent the weight of authority. The cases to the contrary relied on in the opinion of the Supreme Court of Hawaii do not commend themselves

to reason or logic; they concede the instruction is wrong, but contend the error was "harmless". Yet the jurors were told for all practical purposes that they could not convict merely because they had a reasonable doubt as to defendant's guilt, but that they had to have a special kind of reasonable doubt, to-wit, one they could give a reason for. We say that is not good law, that on its face it is prejudicial; and that there should be a reversal in this case for that reason.

Dated, Honolulu, T. H.,
December 27, 1945.

Respectfully submitted,
FRED PATTERSON,
E. J. BOTTS,
Per FRED PATTERSON,
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Receipt of a copy of the foregoing brief is hereby acknowledged this 27th day of December, 1945.

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